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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANK C. KUNNEN, JR.,

Plaintiff and Respondent,

v.

ROBERT F. KUNNEN et al.,

Defendants and Appellants.

D051235

(Super. Ct. No. GIN041923)

APPEAL from a judgment of the Superior Court of San Diego County, Marshall
Y. Hockett, Judge. Affirmed.

Defendants and appellants Beverly Kunnen and Robert Kunnen appeal from a judgment in favor of plaintiff and respondent Frank Kunnen¹ following a bench trial in which the trial court found defendants owed Frank \$12,000 plus interest, attorney fees and costs under a February 1988 promissory note providing it was payable "upon

¹ We refer to the parties by their first names to avoid confusion, and intend no disrespect.

completion" of a certain property development project. On appeal, defendants challenge the trial court's factual findings and legal conclusions, particularly its finding that the statute of limitations did not bar Frank's action. They further contend the court applied the wrong standard in ruling on their motion for judgment at the close of plaintiffs' evidence and it should have denied Frank relief because he did not admit the original promissory note into evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We state the facts viewing the evidence in the light most favorable to Frank as the respondent, resolving all evidentiary conflicts in his favor and indulging all reasonable inferences possible to uphold the trial court's findings. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528; e.g., *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827 (*Sheily*).)² We presume the trial court made all factual findings necessary to support the judgment for

² As in *Sheily*, *supra*, 122 Cal.App.4th 824, defendants' opening brief is seriously deficient in failing to provide citations to the trial testimony in its factual recitation, and providing only minimal record references in the accompanying arguments. "It is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references. Upon the party's failure to do so, the appellate court need not consider or may disregard the matter." (*Id.* at p. 826, fn. 1.) Thus, "[i]f a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Defendants seek to remedy these deficiencies by providing additional record citations in their reply brief, but because parties may waive issues by raising them for the first time in a reply brief (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214), we decline to consider points to the extent they raise new arguments or issues.

which substantial evidence exists in the record. (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.)

Frank and Robert Kunnen are brothers. In 1988, Robert was married to Beverly Kunnen. In or about February 1988, Frank loaned \$12,000 to defendants after he had a telephone conversation with Robert, Beverly and his and Robert's mother, Genevieve Kunnen, in which defendants informed him Robert needed \$6,000 immediately and another \$6,000 in 30 days. In that conversation, either Genevieve or Beverly asked Frank to loan defendants the money. Defendants signed a form document entitled "Straight Note" providing that for value received, they promised to pay Frank upon demand or order, a "cumulative" sum with interest from February 1, 1988, until paid, at the rate of 10 percent per annum "payable upon completion of 709 Hilo Way project Vista, California." The form document includes typewritten numbers one through 20 with two handwritten notations next to numbers one and two: "2/1/88 \$6,000" and "3/1/88 \$6,000." Frank agreed to give them the money on the terms set out in the February 1988 note as a loan, not as an investment in the project. Frank did not prepare the note; when he received it the note was already filled out and signed. Nor did he ever question defendants about the phrase "upon completion of 709 Hilo Way project." During the first conversation about the loan, Robert talked about doing a lot split on property located at Hilo Way, so Frank assumed the project was a lot split.

Frank never received any payments from defendants on the February 1988 note. From 1988 to 1999, Frank visited with defendants twice and kept in touch with them by telephone every few months mostly about the care of their mother, but not about the

project's status. Frank also visited the property the week before trial. In 1999 when Frank was in California visiting, Robert showed him the property in passing. At that time, Robert was in the process of creating a retention pond or a lake on the property. Frank did not ask Robert at the time if he was going to repay him; his general feeling was that Robert was trying to progress toward a lot split but had not accomplished that yet, and Frank was willing to wait until he did that. He was not there to track the project's progress.

It was not until July 2004, that Frank made a demand for payment under the note. He had become concerned about the project's status after he learned that in May 2004, a few days before his mother's death, she had transferred some of the Hilo Way property to Joyce Sutherland, trustee of the Margaret W. Kunnen Living Trust, under a quitclaim deed signed by Robert under a power of attorney. Frank felt he was either being left out or he wasn't going to get paid. His mother's death also had an impact on his decision to make a demand because she had a financial interest in the development and she had been the one to assure Frank everything was going along smoothly. Frank later filed suit against defendants asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and unjust enrichment.

The matter proceeded to a bench trial. At trial, Robert admitted he never made any payments on the \$12,000 note but that the project was to be a joint development project with Frank, who never put up his share of the money. He testified that some of the money Frank gave them went to an attorney to set up a corporation, some went to a surveyor, and some of it went to their mother at Frank's instruction. Robert testified the

note was not a loan; he only signed it when someone asked for it. According to Robert, the Hilo Way project included a granny flat for his mother and a lot split. Frank testified he never agreed to invest money in the Hilo Way project nor did he have discussions with Robert about investing in the Hilo Way project. He testified he never told Robert to set up a corporation or use the \$12,000 to set up that corporation, and he denied Robert's claim that he wanted to send one of his sons out to California to learn to be a contractor. Frank was aware Robert was forming a company called Big K Pacific, but he believed it had nothing to do with him.

The trial court entered judgment in Frank's favor in the sum of \$12,000 plus interest, ruling defendants violated the implied covenant of good faith and fair dealing by unfairly frustrating Frank's right to reimbursement and interest under the note. In its statement of decision, it found: (1) the parties had entered into the promissory note; (2) the note was unclear, thus permitting testimony about its meaning, but Robert's testimony was inconsistent and evasive; (3) defendants were obligated under the terms and conditions of the note, as to which there were no "side" agreements or agreements modifying its terms; (4) defendants received \$12,000 from plaintiff, used it in part on the project, and had not repaid any monies on that obligation; (5) Frank made a repayment demand on the note in July 2004 and defendants did not show his claim was barred by the statute of limitations; (6) defendants never indicated the project had been abandoned or that they did not intend to repay him on the note; and (7) one of the primary reasons for the project was to provide the parties' mother with a residence, and shortly after her death in May 2004, Frank properly made his demand for repayment.

DISCUSSION

I. Request to Dismiss Appeal

Frank requests that we dismiss Robert's appeal as untimely because he had served defendants with a notice of the trial court's judgment on February 23, 2007, requiring defendants to serve their notice of appeal within 60 days (by April 24, 2007), which they did not do. We denied Frank's earlier motion to dismiss this appeal made on the same grounds, and we have no reason to change our decision on his present request. Frank's assertion as to his service of notice of judgment in February 2007 is without any record citation, and in fact the present record does not contain a notice of entry with a proof of service showing service on February 23, 2007. In the absence of record support for Frank's position, we deny his request.

II. Sufficiency of Evidence

Defendants contend the trial court erred in making several of its factual findings. Specifically, they argue the court erred by (1) concluding the parties made no side agreements modifying the terms of the February 1988 note; (2) finding the primary reason for the project was to provide a residence for their mother Genevieve; and (3) finding they breached the implied covenant of good faith and fair dealing by engaging in conduct that would frustrate Frank's rights to the benefits of their contract.

None of these contentions discuss or apply the proper appellate standard of review. The relevant question on appeal is whether the trial court's express and implied factual findings are supported by substantial evidence in the record. (See *Porter v. Arthur Murray, Inc.* (1967) 249 Cal.App.2d 410, 421 ["Whether there is a material

breach of a contract is in general a question of fact"]; *Assoc. Lathing etc. Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49; accord, *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051-1052.) "[W]here a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination. [Citation.] [¶] The appellate court views the evidence in the light most favorable to the respondents [citation], resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings [citation]. However, when the decisive facts are undisputed, the reviewing court is confronted with a question of law and is not bound by the findings of the trial court. [Citation.] In other words, the appellate court is not bound by a trial court's interpretation of the law based on undisputed facts, but rather is free to draw its own conclusion of law." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc., supra*, 73 Cal.App.4th at p. 528.) We may not reweigh the evidence or substitute our determination of witness credibility for that of the trial court. (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454.)

Rather than directing us to a lack of evidence in support of the trial court's findings, defendants recite testimony and evidence that they apparently believe should have supported findings or judgment in their favor (largely without record citations, as Frank points out). We are required to review the record for substantial evidence *supporting* the trial court's express factual findings (as well as those we imply in favor of

the judgment). Given defendants' deficient briefing we are entitled to deem their sufficiency of the evidence arguments waived. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

Nevertheless, we conclude substantial evidence supports the trial court's findings. The uncorroborated testimony of one witness, if believed by the trial court and not inherently unreliable, can constitute substantial evidence. (Evid. Code, § 411; *Plastic Pipe and Fittings Ass'n v. California Building Standards Com'n* (2004) 124 Cal.App.4th 1390, 1407, citing *People v. Scott* (1978) 21 Cal.3d 284, 296.) Here, Frank specifically denied entering any of the "side" investment agreements urged by defendants at trial, and the trial court found him to be the more credible witness, having expressly rejected Robert's credibility. Robert himself explained on cross-examination his understanding of what was meant by "completion of the 709 Hilo Way project": he testified the "main project" was a granny apartment for his mother to use, and the project also entailed obtaining a parcel map and lot split. Beverly's testimony was consistent. The trial court was entitled to credit this testimony in reaching its finding that the parties had agreed "one of the primary reasons" for the project was construction of a granny flat.

We likewise reject defendants' challenge of the trial court's findings relating to the breach of the implied covenant of good faith and fair dealing.³ Defendants first contend

³ "Breach of a specific contractual provision is not a prerequisite to asserting [a] cause of action [for breach of the implied covenant of good faith and fair dealing]. [Citation.] However, '[i]t is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. [Citations.] . . . [U]nder traditional contract principles, the implied covenant of

the court erred by concluding they were under an obligation to provide Frank with notice they abandoned the project by implying such an additional term through the theory of the implied covenant of good faith and fair dealing. They maintain there was no direct testimony, or evidence that could be implied from trial exhibits, to support the court's finding that Frank "trusted and relied on [Robert's] comments that the Project was ongoing but had miscellaneous difficulties relating to lot splits, etc." Second, they maintain there is no evidence at all to support the court's finding they engaged in conduct frustrating Frank's rights to benefits of the promissory note.

Defendants' first argument fails on its premise, because the trial court did not find that the February 1988 note required defendants to give Frank notice of abandonment of the project. The court ruled generally that defendants' actions unfairly frustrated Frank's right to reimbursement and interest. Accordingly, defendants misplace reliance on the principle that the covenant cannot impose new substantive terms. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349-350 [implied covenant cannot be endowed with an existence independent of its contractual underpinnings and cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement].)

good faith is read into contracts "in order to protect the express covenants or promises of the contract" [Citation.]' [Citation.] ' "In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." ' " (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855, in part quoting *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373.)

The argument also misperceives the sufficiency of the evidence standard, under which we are entitled to indulge any inferences in favor of the judgment that may be reasonably drawn from the evidence. Here, the court could reasonably infer Robert made some representations to Frank about the ongoing nature of the project from Frank's testimony that when he visited California in 1999, Robert showed him the property on which he was in process of building a retention pond or lake, and the fact that as a result of that visit, Frank reached a general feeling that Robert was still trying to progress toward a lot split but had not accomplished that yet. It was not necessary that Frank recall specific discussions about the project's progress; the trial court could deduce discussions had occurred by virtue of the fact Robert showed him ongoing construction, and also deduce that Frank maintained trust in his brother Robert – that Frank had no reason to doubt Robert was progressing toward completion – by Robert's admissions that he never told Frank the project was abandoned and Frank's testimony that neither defendant said they did not owe Frank \$12,000 as reflected in the note.

As for defendants' second argument, we disagree the record is absent evidence supporting the finding that they engaged in conduct frustrating Frank's rights to the note's benefits. The covenant of good faith and fair dealing " 'not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093.) As Frank points out, whether or not the Hilo Way project would be completed rested in defendants'

hands. We agree with Frank that under the implied covenant, defendants had a duty to actively pursue the project's completion so as not to frustrate Frank's right to repayment, and to refrain from taking action to undermine that goal. The evidence, however, shows that the project progressed extremely slowly, and Robert eventually began facilitating the transfer of title to portions of the property to third persons without Frank's involvement. We conclude substantial evidence supports the trial court's ruling as to breach of the implied covenant of good faith and fair dealing.

III. *Asserted Failure to Address Condition Precedent in February 1988 Promissory Note*

Pointing out the trial court considered parol evidence to interpret the February 1988 note, defendants contend the court erred by failing to define what the parties in fact meant by the term "upon completion of the 709 Hilo Way Project, Vista, California" and by failing to decide whether all of the parties had the same understanding and meaning to the phrase. Defendants argue that absent such findings, there is an issue whether the parties in fact had a meeting of the minds, and "as such," the note should be read as a straight note without the condition precedent, on which any cause of action accrued at the time of its execution in February 1988. Based on this latter argument, defendants maintain the statute of limitations ran on Frank's causes of action in February 1992, thus barring his recovery.

In resolving defendants' contentions, we apply settled principles of appellate review. Specifically, "it is settled that '[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is

not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

" 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

It "is counsel's duty by argument and citation of authority to show *in what respects* rulings complained of are erroneous." (*Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265, italics added.) All litigants are bound by the rule that "[t]he reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Points are deemed abandoned when they are entirely unsupported by argument or reference to the record. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699; *Renden v. Geneva Development Corp.* (1967) 253 Cal.App.2d 578, 591; Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief must . . . [¶] . . . [¶] . . . [s]upport any reference to a matter in the record by a citation to the volume and page number in the record where the matter appears".]) And, relevant to this appeal, "[a]rguments should be tailored according to the applicable standard of appellate review." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.)

Defendants' contention fails at the threshold for the absence of any reasoned legal argument or pertinent authority with respect to contract interpretation, particularly the assertion that the note must be interpreted as payable on demand absent a "true meeting of the minds." The interpretation of a contract generally presents a question of law for a court to determine anew unless the interpretation turns on the credibility of conflicting extrinsic evidence. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 (*ASP Properties*).) When a contract is reasonably susceptible to different interpretations based on conflicting extrinsic evidence requiring the resolution of credibility issues, its interpretation evolves into a question of fact to which the reviewing court applies the substantial evidence standard of review. (*ASP Properties*, at pp. 1266-1267.)

Here the trial court considered extrinsic evidence as to the meaning of the note, and in particular, what the parties intended if "completion of the 709 Hilo Way project" never occurred. Contrary to defendants' contentions, the extrinsic evidence included direct testimony about what the parties' meant by the 709 Hilo Way project, including Robert's testimony that it meant "that that house would go to completion and make a room for my mother." The court implicitly adopted Robert and Beverly's testimony that the project consisted mainly of a granny flat for Genevieve, as well as a lot split. Defendants' testimony on this point was not contradicted by Frank, who testified he did not pay attention or inquire about the meaning, but assumed the project was a lot split. As to whether the note was a loan or an investment, the court adopted Frank's testimony

that the agreement was a loan. Because the trial court considered conflicting extrinsic evidence, the question on appeal becomes whether its findings are supported by substantial evidence. Frank's testimony, summarized above in our factual recitation, amply supports the court's implicit (if not express) finding that the note reflected a \$12,000 loan from Frank to defendants, which was payable upon completion of the granny flat and lot split, events that never occurred in part due to Robert's actions frustrating performance under the note. Defendants' remaining arguments are simply without reasoned legal arguments or authority, and we decline to reach them.

IV. Statute of Limitations

Defendants contend the court erred in rejecting their statute of limitations defense. We disagree for several reasons.

First, defendants' argument is based is on assertions that are not supported by the record. For example, defendants assert that the trial court's statement of decision seems to indicate that the Hilo Way project was abandoned in 1988. However, no such finding appears in the statement of decision. In defendants' reply brief, they assert that when Frank testified about his visit to the property in 1999, he admitted it "really was not much construction to create this retention pond"; that the pond "was not much more than a natural reservoir due to the natural contour of the properties in the area." But Frank did not so testify; when asked on cross-examination about the retention pond, Frank stated, "I believe at the time [Robert] was in the process of having a well, a deep well, so he could pump the water into this pond," which Frank described as "almost a natural thing. It's – I guess we don't have many mountains in our part of the country" and on "the lowest

portion of the property" with hills on each side. Further, defendants characterize Frank as testifying that during his most recent visit (during the week before trial), the additional work done was "nothing substantial." But Frank answered, "Yes" when asked if he noticed "very much difference" in the property between his 1999 visit and his most recent visit; he testified that "one or two more" mobile homes had been installed, "the road seemed to be graded better," and the "large portion of the property seemed to be a lot cleaner and neater." Finally, defendants argue Frank could not have been updated on the project's status by their mother, since after 1994 she had remarried and "no longer lived on the Hilo Way property, but instead resided in her own condo in Carlsbad, where she continuously resided until the day she died." The record, however, does not support these factual assertions.⁴ At the cited portion of the record, Frank testified he could not recall where his mother was residing in 1990; that when he came out to visit her for her birthday party she had remarried, but he did not recall whether she was living in a condominium or living on the Hilo Way property. Defendants point to no other evidence concerning Genevieve's residence over the years.

Further, we reject defendants' argument that Frank, concededly a knowledgeable contractor, should have realized the Hilo Way project was abandoned by 1991. First, Beverly admitted that as recently as a few months before trial, Robert was working with

⁴ Defendants append to their brief and also include in the record a marriage certificate purportedly showing that Genevieve was married on January 3, 1994, to George Jacob Dieterle, Jr. However, there is no indication that document was listed as a trial exhibit or before the trial court. It in any event says nothing about Genevieve's living arrangements.

the City on getting a sewer approved on the property for a person who had attached into it ("I know he's trying to get the sewer okayed and everything"), although she claimed the person had illegally attached to the sewer and Robert's efforts had "nothing to do with the lot splits." Frank testified he did not find it unusual for the project to take 16 years to complete; he had been a licensed general contractor in Florida for 55 years (operating under the name Big K Construction Company), had been involved in subdivision projects, and he himself had purchased property in 1980 on which he had yet to build. He understood Robert was trying to split the property into five or six lots, which could be problematic. Frank explained that during the course of the years, he never inquired about the project's status or the repayment of the monies because he was never very concerned about it; Robert never told him the project was completed and his mother told him the project was always being pursued but they were having difficulties with the different agencies, so he "never gave it that much thought." Defendants never told him they did not owe him \$12,000 on the note. Robert admitted at trial that he never told Frank the project was abandoned. Indeed, the evidence showed that in 1991, Robert accepted an approximately \$43,000 loan from Beverly for the project, which was spent on the project as late as June of 1991.

Defendants rely on the proposition that the statute of limitations cannot be indefinitely suspended by unreasonably delaying the making of a demand on a demand

note.⁵ Defendants also cite *Ghirardelli v. Peninsula Properties, Co.* (1940) 16 Cal.2d 494 for the proposition that where a note is due on satisfaction of a condition or failure to satisfy such condition, demand must be made upon satisfaction of the condition precedent or at a time it is clear that the condition cannot and will not be satisfied. *Ghirardelli* involved agreements under which the creditor could not sue for unpaid amounts until a trustee had made an accounting, and thus the statute of limitations did not begin to run until that condition precedent had been performed. (*Id.* at p. 498.) As defendants acknowledge, application of the principles in these cases requires an assessment of the specific facts and circumstances of the transactions at issue, which the trial court conducted in this case.

Under the circumstances and on this record, we conclude the evidence supports the trial court's implied finding that Frank had no reason to suspect defendants were not

⁵ Defendants cite *O'Hair v. U.S. Fidelity & Guaranty Co.* (1935) 9 Cal.App.2d 307, *Bogart v. George K. Porter Co.* (1924) 193 Cal. 197 and *Flickinger v. Heck* (1921) 187 Cal. 111. *O'Hair* involved an action on a bond that the appellant contended was barred because the respondent delayed the issuance of execution for an unreasonable length of time. (*O'Hair*, at p. 308.) The trial court concluded the cause of action was not barred, observing that "what is a reasonable time will depend upon the circumstances of each case. A party cannot by his own negligence, or for his own convenience, stop the running of the statute." (*Id.* at p. 309.) In *Flickinger v. Heck*, the court stated: "The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable." (*Flickinger*, 187 Cal. at p. 115.) The court held the demand in that case was timely because it was made less than two years after the right to make it arose. (*Ibid.*)

proceeding with the Hilo Way project until approximately 2004, and that Frank's demand was timely made in July 2004 and his action timely filed. It did not err in ruling defendants did not prove the statute of limitations had accrued and run so as to bar Frank's action.

V. Credibility Findings

Defendants fault the trial court for failing to make a finding about the consistency and evasiveness of Frank's testimony; they maintain the court did not appear to consider his credibility in its interpretation of the extrinsic evidence. Defendants proceed to summarize perceived weaknesses in Frank's testimony as well as what they characterize as "overwhelming evidence" supporting their position, i.e., that the parties' agreement as to Frank's \$12,000 was not a loan but rather Frank's investment into the project, in an attempt to demonstrate why they should have been believed by the trial court.

Again, the contention is without merit. In effect, defendants are asking us to reweigh the evidence and conclude that the trial court should have believed their evidence. We may not do so. As long as there is substantial evidence that supports the trial court's conclusions, we must affirm its judgment, even if there is also evidence which would support a different conclusion if it had been believed by the trier of fact. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

VI. Motion for Judgment

After the conclusion of Frank's evidence, defendants made an oral motion for judgment in their favor under Code of Civil Procedure section 631.8, on grounds the evidence demonstrated Frank's action was barred by the statute of limitations. Counsel

argued Frank should have realized, or had actual knowledge that the project had been abandoned since at least 1991 or 1992, and that the statute of limitations would have run from that point. The court denied the motion without prejudice, noting the evidence was controverted, it had not had an opportunity to review the exhibits, and there was likely additional evidence relevant to the question. It invited counsel to repeat their arguments at the conclusion of the case.

Defendants contend the trial court applied the wrong standard on their motion. They argue because the court summarily denied their motion on the ground there were controverted issues, it did not weigh the evidence as it was required to do, mandating reversal of the judgment. The argument is without merit. The court did not summarily deny the motion; it denied the motion without prejudice to hearing it after the conclusion of the case. Second, defendants' counsel did not challenge the court's ruling at the time, after the court invited the parties to revisit the motion, counsel said, "Okay. Agreed." Thus, defendants may have forfeited any claim of error.

In any event, we are not persuaded the court failed to apply the proper standard; it stated it would consider the arguments at the close of the case. This procedure is expressly permitted by Code of Civil Procedure section 631.8, subdivision (a) which provides: "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as

provided in Sections 632 and 634, *or may decline to render any judgment until the close of all the evidence.*" (Italics added.) Defendants have not shown error in the trial court's procedure.

VII. *Admission of Original Promissory Note*

Defendants contend the trial court should have denied Frank relief for his failure to admit into evidence the original promissory note; they assert that to enforce the terms of a promissory note, a person is "generally required to produce and admit into evidence the original document." They argue we should reverse the judgment and enter judgment in their favor for this reason. We deem the contention abandoned as it is not accompanied by any reasoned legal argument or authorities.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.